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**A Finding of Unfair Dismissal Does Not Always Result in Compensation**

An award of compensation might be thought to follow a finding of unfair dismissal as surely as night follows day. However, as a case concerning a care worker accused of stealing money from a vulnerable client showed, that is not always the case (Brown v Castlerock Group Ltd).

The worker had, on three occasions, used ATMs to withdraw a total of £800 from the client's bank account. She was adamant that she had been told to do so by the client, to whom she had handed over the money. She was investigated by the police but was not prosecuted. Following a disciplinary hearing, however, her employer dismissed her on grounds of gross misconduct.

In subsequently upholding her unfair dismissal complaint, an Employment Tribunal (ET) identified a number of procedural failings in the disciplinary process. Amongst other things, there was no adequate investigation of her alleged wrongdoing. She was deprived of a fair opportunity to put her case in that the disciplinary hearing, rather than being adjourned as it should have been, was held in her absence.

In refusing to award her any compensation, however, the ET found that the employer had reasonable grounds for concluding, on the balance of probabilities, that she had indeed committed theft. Even had the disciplinary process been entirely fair, the ET ruled that her dismissal would have been inevitable.

Rejecting her challenge to that outcome, the Employment Appeal Tribunal (EAT) acknowledged that it was unusual for a finding of unfair dismissal to result in no award of compensation. However, the ET had approached the evidence with common sense and was entitled to reach the conclusion it did.

The EAT considered whether she might have kept her job if she had been given the opportunity to put forward her mitigation. A single mother of three children, she had an otherwise clean, 10-year service record and her dismissal was likely to mark the end of her professional career. However, the EAT was satisfied that those matters would have made no difference to the outcome. The ET's decision to reduce her compensation to zero was really unassailable.

Contact **<<CONTACT DETAILS>>** for individual advice on unfair dismissal claims.

**British Council Must Face Overseas Worker's ET Claim**

In a ground-breaking ruling, an Employment Tribunal (ET) cited the will of Parliament and the rule of law in agreeing to hear a case brought by a former British Council employee who lives overseas and has never worked in the UK (Beldica v The British Council).

Following the termination of her employment in the United Arab Emirates (UAE), the woman wished to pursue various complaints against the British Council in this country. For its part, the Council contended that the ET lacked territorial jurisdiction to consider the matter and that her claim should be struck out.

Ruling on the jurisdictional issue following a preliminary hearing, the ET noted that the woman is a Romanian national who is settled with her family in the UAE, where she was recruited. She was paid in local currency and was not invited to join the Council's pension scheme. She enjoyed none of the other benefits enjoyed by the Council's UK personnel and had never worked in or travelled on business to the UK.

The British Council is a charity which operates in a great many overseas countries, as well as in the UK, and which exists to further British cultural and other interests abroad. It describes itself on its website as a non-department public body that spends UK taxpayers' money and is formally accountable to Parliament.

The ET found that the woman, whose employment contract was governed by UAE law, was a true expatriate worker and a local employee of the Council through and through. She had no significant connection to Britain or British employment law.

In nevertheless accepting jurisdiction to hear her case, the ET noted the serious procedural difficulties she had faced in attempting to pursue a claim against the Council in the UAE. Even had she succeeded in doing so, the likelihood was that the Council could have defeated her claim by relying on diplomatic immunity arising from its close association with the British embassy in the UAE.

If it were to claim such immunity, the Council would clearly be acting as an emanation of the UK state. Its immunity from being sued in the UAE would effectively destroy any link the case had to UAE law, no matter how strong that link would otherwise have been. Successful reliance on such immunity would also have the potential to breach the woman's human right to a fair hearing.

Whilst acknowledging that the Council is essentially a private organisation, the ET noted that it enjoys certain privileges due to its close association with the UK government. Put simply, Parliament could not have intended that a British employer, organised and operating in accordance with UK law, should escape judicial scrutiny of its actions relating to its employees hired in foreign lands.

Given the lack of any legal remedy open to the woman in the UAE, the ET found that such an approach would compromise the rule of law. That was particularly so given that the Council acts as a cultural ambassador, representing and promoting UK values and democratic principles abroad. The ruling opened the way for the woman to proceed with her claim in this country.

Our experienced team can advise where questions regarding employment law jurisdiction arise. Contact **<<CONTACT DETAILS>>** for advice.

**Employment Tribunals Can Spot a Sham Redundancy When They See One**

It can be hard to distinguish an unfair dismissal from a genuine redundancy process. As was shown by the case of a property manager who found himself on the receiving end of his boss's unjustified pique, however, Employment Tribunals (ETs) tend to know a sham when they see one (Malik v Al-Mubarakia Ltd).

The founder of the business for which the man worked had taken strongly against him. During a recorded meeting, she made a number of offensive remarks about him in his absence. After he launched proceedings, an ET found that it was at that point that she irrevocably decided that his employment would be terminated. A redundancy exercise ensued, culminating in his dismissal.

The decision to dispense with his services having already been reached, the ET found that the redundancy process was a sham. Steps had been taken to redistribute his work to other employees and so-called consultation meetings were little more than going through the motions.

There was no evidence that the founder's serious criticisms of him were justified and the ET found that his inevitable dismissal was capricious, borne of pique and the founder's unwarranted personal dislike of him. A deliberate attempt was made after the event to justify his dismissal on capability grounds.

In also upholding his race discrimination claim, the ET found that the employer had failed to show that the founder's hostility towards him and her decision to dismiss him were in no sense caused by her view that people of his racial background were not to be trusted.

His racial harassment complaint further succeeded on the basis that her derogatory comments about him were all linked to a negative view of his race once things went wrong in the employment relationship. If not agreed, the amount of his compensation would be assessed at a further hearing.

The manner in which the redundancy process is conducted is important and irregularities will be easily discovered by Employment Tribunals. Contact us for advice on the fair and proper course of action.

**Inadequate Workplace Toilet Triggers Direct Sex Discrimination Finding**

As those who follow the news will know, public and workplace toilet facilities are the focus of a national debate concerning gender. In an employment case on point, a female office clerk who had to share a toilet with male colleagues succeeded in a direct sex discrimination claim (Earl Shilton Town Council v Miller).

The woman worked for a local authority in a building fitted with both male and female toilets. She used the female toilet when she could, but accessing it was problematic in that it was in part of the building used by a playgroup. In response, her employer offered her access to the male toilet, which consisted of a single cubicle that could only be entered by passing a trough urinal.

There was no lock on the entrance door to the male toilet. A sign was provided that alerted men when the toilet was occupied by a woman, but it did not always stay in place. There was in any event a risk that a man might disregard the sign. That in turn gave rise to a risk of women using the toilet witnessing a man at the urinal. During the relevant period, the toilet also did not feature a sanitary bin.

Upholding the woman's sex discrimination complaint, an Employment Tribunal (ET) found that she had been subjected to a series of detriments. The inadequate toilet facilities resulted in her being less favourably treated than her male colleagues. At no point was a man in a position of not having immediate access to a toilet and it did not matter whether the risk of her seeing a member of the opposite sex relieving himself had in fact materialised.

Rejecting the employer's challenge to that decision, the Employment Appeal Tribunal noted that her difficulties could readily have been resolved by fitting a lock to the toilet's entrance door and installing a sanitary bin. Both those steps were belatedly taken by the employer.

The ET had applied robust common sense in concluding that the toilet facilities were inherently discriminatory in that they did not adequately meet her needs as a woman. The risk of her coming across a man using the urinal and the lack of a sanitary bin both amounted to less favourable treatment arising from her gender.

In its ruling, the ET had also found that that she had been subjected to harassment on three occasions and had been victimised by being dismissed. The amount of her compensation would be assessed at a further hearing, if not agreed.

We can assist you in dealing with any matters relating to sex discrimination. Contact **<<CONTACT DETAILS>>** for expert advice.

**Manager's 'Limitations' Comment Leads to Disability Discrimination Finding**

Employers should take careful note of a case in which a manager's reference to the 'limitations' of a bar attendant who suffered from osteoarthritis was adjudged to be unfavourable treatment giving rise to disability discrimination (Taylor v Hoddom Castle Coach House Ltd).

Osteoarthritis in the woman's right arm and upper spine meant that she found many everyday tasks difficult, including raising her arm to wash her hair. Her home was fitted with grab rails and she was incapable of heavy lifting. At work, she could not manage trays loaded with plates and empty glasses or hoover at the end of her shifts.

After she complained to her supervisor that she was not being offered enough shifts, he mentioned that her limitations had to be taken into account. When she queried whether that was a reference to her disability, he denied that it was. He said that the difficulty arose from her wish to work shortened shifts and the need to factor other staff into the rota. She subsequently resigned.

Upholding her disability discrimination claim, an Employment Tribunal (ET) found that she had suffered unfavourable treatment arising from the use of the word 'limitations'. She wanted to work shortened shifts because of her disability and the resulting reduction in the number of shifts offered to her also amounted to unfavourable treatment.

The ET noted that she worked for the employer for 40 hours in total and had since found alternative employment. She was awarded overall compensation of £1,140, that sum representing three weeks' lost wages and £900 for injury to her feelings.

Expert employment law advice is vital when incidences of disability discrimination are alleged. Contact our team for guidance.

**'Miscarriage of Justice' Belief Triggers Guideline Whistleblowing Ruling**

In whistleblowing cases, defining what is and is not a protected disclosure is a multi-faceted process. That was certainly so in a case concerning a senior coroner's officer who was utterly convinced that she was on the trail of a serial killer (Davies v The Chief Constable of Cheshire Police).

The woman, a civilian working for a police force at a comparable grade to that of a detective chief inspector, was, with the support of her employer, working towards a PhD and was given access to historic coroner's officer files to assist her in her studies. She was, however, warned to be mindful as to how she used them.

She reviewed two cases in which murder-suicide verdicts were returned – a male was found to have killed a female and then himself. She formed the view that the verdicts were unsafe and that the incidents might be unsolved double murders. She believed that similarities between them indicated the hand of a serial killer.

She disclosed a report on her findings to a senior serving police officer on the force who, after considering its contents, took the view that there was nothing to justify reinvestigating the incidents. She also disclosed reports to an external forensic expert, a retired senior coroner's officer and two retired senior police officers. In some instances, the disclosures included forensic photographs.

After she lodged a complaint that she had been subjected to detrimental treatment for making public interest disclosures, an Employment Tribunal (ET) considered as a preliminary issue the question of whether the disclosures qualified for protection under whistleblowing legislation.

Ruling on the matter, the ET found that she reasonably and genuinely believed that the information contained in the reports was true and tended to show that the inquest verdicts were unsafe, that a miscarriage of justice had occurred and that criminal offences had been committed. She acted through utter conviction that she had detected double murders and she reasonably believed that she was making the disclosures in the public interest.

The ET acknowledged that her motive in making the disclosures was to expose what she believed to be the truth. The disclosure to the serving officer qualified for whistleblowing protection. However, the ET ruled that other disclosures to individuals who were external to the force did not so qualify in that they were not, in all the circumstances, made reasonably.

The ET noted that, in one instance, she could have anonymised the photographs and refrained from sharing the identity of the victims, but did not do so. In others, she provided information about a named individual, identifying him as having previously been a suspect. It was, in particular, unreasonable to disclose extremely sensitive and newsworthy content, including photographs of the deceased, to one of the retired officers who she was aware had media connections.

It is important to recognise when workers have rights under the whistleblowing legislation and to investigate thoroughly matters raised in such circumstances. Contact **<<CONTACT DETAILS>>** for advice.

**Running a Business Via Group Chats and Instant Messaging Has Its Pitfalls**

Business owners who use social media group chats or instant messaging as an easy means of communicating instructions to staff may be prompted by an Employment Tribunal (ET) decision to consider other management tools (Thorns v Sutton T/A St Margaret's Nursery).

The owner of a family-run plant nursery suffered from anxiety and, during a period in which he largely worked from home, communicated with staff by means of social media group chats. The tone of such messages was generally very informal and jokes and swear words were sometimes included.

He set high standards, actively running the business in his own particular way, and used the group chats to express concerns and to challenge or question members of staff. There was, however, a gulf in perception and expectation between him and the nursery's general manager as to what was, and was not, an appropriate managerial communication. His messages were not always clear or fully understood and the manager came to consider them as unprofessional.

The manager had expressed concern about criticisms of his performance contained in some of the owner's group chat postings. However, matters reached a head when he received a private message in which the owner accused him of being dishonest and telling falsehoods. It was that message which was the main or dominant factor in his decision to resign.

Upholding the manager's unfair constructive dismissal complaint, the ET accepted that the owner may honestly have believed that he was doing nothing wrong. He did not intend the private message to prompt the manager's resignation although, given its content, that was highly likely to be the result.

The difference between them was better described as a misunderstanding and there was no reasonable basis for accusing the manager of deliberate falsehood or dishonesty. The ET found that the message destroyed the relationship of trust and confidence that should exist between any employer and employee.

It amounted to a fundamental breach of the manager's employment contract. He could not reasonably have been expected to put up with it and his resignation was the almost inevitable consequence. The amount of compensation due to him would be assessed at a further hearing, if not agreed.

Contact **<<CONTACT DETAILS>>** for individual advice on unfair constructive dismissal matters.

**Writing a Job Reference? It's Important to Choose Your Words Carefully**

Business owners and managers tend to view writing job references as an important but relatively routine task. However, the need to choose words carefully – and to take professional advice where necessary – was underlined by a High Court ruling in a libel case (Smith and Another v Surridge and Others).

After moving on from one secondary school, two teachers received conditional offers to work at another. The specialist recruitment agency through which they had found their prospective new jobs requested a reference from the school.

The reference included the words 'I would like to inform you that there were some safeguarding issues during their time at (the school)'. The teachers denied that there were any such issues and claimed that the reference resulted in the withdrawal of their job offers. They launched proceedings, seeking damages for alleged libel, misuse of private information and negligent misstatement.

In considering the precise meaning of the words as a preliminary issue, the Court noted that the reference was formal correspondence between two organisations that were used to dealing with pre-employment checks. The meaning of the words fell to be judged through the eyes of a hypothetical reasonable reader.

The Court acknowledged that safeguarding is a broad concept. Yet, in the context of a school reference, it was reasonable to assume that the focus of safeguarding is on the protection of children from harm or the risk of harm. However, a reasonable reader of the reference would not have jumped to the conclusion that the 'issues' mentioned related to abuse or maltreatment.

The use of the word 'some' did not indicate that there was more than one issue in respect of each teacher. However, the wording of the reference was clear and a reasonable reader would not have interpreted it as merely suggesting that there were safeguarding allegations or concerns.

The Court found that the reference's meaning was that each teacher did something whilst working at the school that gave rise to a safeguarding issue – something that either caused harm to a child or placed a child at risk of harm. That meaning was defamatory at common law. It was agreed that the words complained of were a statement of fact, rather than opinion.

We can advise you on all aspects of employment law. Contact **<<CONTACT DETAILS>>** for expert guidance.

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